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No. 84-406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL FOOTBALL LEAGUE, *et al.*,
Petitioners,

v.

OAKLAND RAIDERS, LTD., and LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents.

REPLY BRIEF FOR NATIONAL FOOTBALL LEAGUE PETITIONERS

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
I. THE SINGLE ENTERPRISE ISSUE SHOULD BE RESOLVED BY THIS COURT...	1
II. PETITIONERS DO NOT SEEK IMMUNITY FROM SECTION 1 OF THE SHERMAN ACT.	6
CONCLUSION	9

TABLE OF AUTHORITIES

	Page
CASES:	
American Football League v. *National Football League*, 323 F.2d 124 (4th Cir. 1963)	8
Broadcast Music, Inc. v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979)	3
Copperweld Corp. v. *Independence Tube Corp.*, 104 S. Ct. 2731 (1984)	*passim*
Kiefer-Stewart Co. v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951)	2
National Football League v. *Governor of Delaware*, 435 F. Supp. 1372 (D. Del. 1977)	4
National Society of Professional Engineers v. *United States*, 435 U.S. 679 (1978)	8
Perma Life Mufflers, Inc. v. *International Parts Corp.*, 392 U.S. 134 (1968)	2
San Francisco Seals v. *National Hockey League*, 379 F. Supp. 966 (C.D. Cal. 1974)	6
Timken Roller Bearing Co. v. *United States*, 341 U.S. 593 (1951)	2
United States v. *Yellow Cab Co.*, 332 U.S. 218 (1947)	2
WTWV, Inc. v. *National Football League*, 678 F.2d 142 (11th Cir. 1982)	4
Zacchini v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977)	4
LEGISLATIVE AUTHORITIES:	
House Select Committee on Sports, *"Inquiry into Professional Sports,"* 94th Cong., 2d Sess. (1976)	6
OTHER AUTHORITIES:	
R. Bork, *The Antitrust Paradox* (1978)	6
F. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ABA Antitrust L.J. 135 (1984)	8
J. Weistart & C. Lowell, *The Law of Sports* (1979)	6, 8

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This Court should resolve the uncertainty that prevails as to the application of Section 1 of the Sherman Act to the internal operations of professional sports leagues. That uncertainty is of serious concern not only to leagues, teams, and the general public but also to public authorities with a heavy financial stake and community interest in league operations. That uncertainty plainly troubled the majority below, which resolved the dilemma it admittedly faced by treating the NFL members as economic competitors—while acknowledging they were not—based upon decisions of this Court that have since been overruled.

I. THE SINGLE ENTERPRISE ISSUE SHOULD BE RESOLVED BY THIS COURT

Both respondents assume the answer to the question that requires resolution by this Court. Both presume that the NFL members "compete economically" and are business competitors

of each other. Coliseum Br. 1; Raiders Br. 7. Yet the critical question in this case is whether the members of a professional sports league are independent economic competitors or whether they are engaged in a common enterprise to produce and present jointly a single product? If the latter, agreements among them governing the location of the enterprise do not join together previously independent sources of economic power and, accordingly, do not constitute concert of action under Section 1 of the Sherman Act.

The courts below concluded that the NFL members "are not true competitors, nor can they be" (15a) and are not within "the traditional competitive mold." (81a-82a.) Nonetheless, both courts held, as a matter of law, that since each NFL member is a separate *legal* entity, the League location agreement was a conspiracy among independent economic competitors within the ambit of Section 1. (9a-10a, 54a-55a.) In doing so, both courts treated as dispositive this Court's intra-enterprise conspiracy decisions that were "disapproved and overruled" in *Copperweld Corp.* v. *Independence Tube Corp.*, 104 S. Ct. 2731, 2745 (1984). Despite extensive evidence as to the nature of the League and its functioning, the conspiracy issue was taken from the jury and a verdict directed for respondents.[1]

Neither respondent defends the actual holdings and analysis of the courts below on this issue. Neither even mentions the now-overruled decisions in *Perma Life Muffler, Timken Roller Bearing, Kiefer-Stewart,* or *Yellow Cab.*[2] Despite *Copperweld's* mandate that Section 1 bars collective action only among entities that "previously pursued their own interests

[1] The majority below acknowledged that there are "*persuasive reasons for recognizing the NFL as a single entity*, [but] we do not find these reasons so compelling that existing precedent can be ignored . . " (13a) (emphasis supplied.) That "precedent" was, of course, overruled in *Copperweld.*

[2] See 392 U.S. 134 (1968); 341 U.S. 593 (1951); 340 U.S. 211 (1951); 332 U.S. 218 (1947). Respondents' attempt to write off *Copperweld* as irrelevant stands in sharp contrast to the heavy reliance they placed upon the cases that were overruled in *Copperweld.* Both in the District Court and in the Court of Appeals those four cases received top billing in respondents' briefs and arguments.

separately," respondents ignore the Ninth Circuit's acknowledgement that the "NFL teams are not true competitors." (15a.) [3]

Rather than defend the Ninth Circuit's holding,[4] respondents maintain that "the mere fact of separate ownership is sufficient to remove the NFL clubs from the ambit of *Copperweld.*" Coliseum Br. 13; Raiders Br. 19-20. That position cannot be sustained in light of *Copperweld* itself, where this Court emphasized that the "appropriate inquiry" is whether "the logic underlying Congress' decision to exempt unilateral conduct from Section 1 scrutiny" excludes from Section 1 the conduct under review. 104 S. Ct. at 2731.

Congress' logic—that "subjecting a single firm's every action to judicial scrutiny for reasonableness" would "discourage" the productivity and efficiency goals of the antitrust laws (*id.* at 2744)—was ignored by both courts below, despite the fact that it squarely applies to the internal arrangements of a professional sports league. Those arrangements serve to *create* a product—here, NFL football—that, in the absence of such arrangements, could not exist at all. Because they serve to *encourage* production and thereby to satisfy consumer preferences, such internal arrangements are fundamentally different from the condemned agreements of independent *competing* producers. The latter agreements "suddenly bring together economic power that was previously pursuing divergent goals" (*id.* at 2731), and thereby disserve society's interest in pre-

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[3] The Raiders err in asserting that the NFL had no reasonable basis on which to disapprove the Raiders' move. Raiders Br. 13. The Raiders were among the top three most successful and profitable League members with unparalleled support from the team's existing community. Characterizations of the supposed advice of NFL legal counsel (Raiders Br. 4) also fundamentally misdescribe the record.

[4] Respondents get no help from Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979). Unlike the situation in *Broadcast Music,* where the defendant class of "composers ha[d] numerous markets and numerous incentives to produce" (441 U.S. at 22), the NFL clubs simply cannot produce individually their collective product. In any event, the issue of defendants' capacity to conspire was not presented in *Broadcast Music.*

serving competition as a means of encouraging productivity and efficiency. Accordingly, *Copperweld* held that *only "entities that previously pursued their own interests separately"* can "conspire" in violation of Section 1. *Id.* at 2741 (emphasis added). The Court of Appeals' majority, writing before *Copperweld*, recognized that "the NFL teams are not true competitors," and thus essentially acknowledged that their internal decisions are embraced by "the logic underlying Congress' decision to exempt unilateral conduct from Section 1 scrutiny."

Moreover, the formalistic premise of respondents' illusory *Copperweld* distinction—that the NFL member clubs are not commonly owned—misses the mark, for professional sports leagues are enterprises owned in common by the league members. The principal asset and source of revenue for every league member is the *league* product created by all members "as co-producers of a common entertainment product . . . ." *WTWV, Inc.* v. *National Football League*, 678 F.2d 142, 144 (11th Cir. 1982). The joint production of NFL football entertainment gives every member club a property right in the League product. *National Football League* v. *Governor of Delaware*, 435 F. Supp. 1372, 1377 (D. Del. 1977), applying *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575-76 (1977). Accordingly, each member's right to control certain common matters, such as where the League itself will operate, is based not on *agreement* between competitors but on each member's pro rata *ownership* interest in the League enterprise.

The Ninth Circuit's departure from "the logic underlying Congress' decision to exempt unilateral conduct from Section 1 scrutiny" presents a compelling case for this Court's review. For in addition to fostering further confusion as to the location of league members (Pet. 6-14), the decision below puts in question a wide range of intra-league arrangements inherent in the production of a professional league's joint product. If limitations on inter-team "competition" entitle league members to act unilaterally, may a league member do so *whenever* its action will maximize its revenues vis-a-vis other league members? May a team with box office appeal challenge under

Section 1 league-wide revenue sharing arrangements and insist upon a preferential sharing of ticket revenues to maximize its "competitive" position? May dissenting members schedule games against each other rather than play a league's new "expansion" teams in order to maximize their revenues as "competitors"? These are the profit maximization theories that underlie the Raiders' claim to "competitor" status here. Are all such matters to be resolved by juries under the "supple, flexible"—and entirely unpredictable—rule of reason? Raiders Br. 10.[5]

Certain agreements among League members, such as the location agreement, do not by any reasoning bring together economic forces that had previously acted independently in the marketplace. From its inception, the NFL has been an admittedly lawful joint enterprise. As an NFL member, the Raiders have never sought to set up a competing league or hire out as a barnstormer. They simply want to retain all the benefits of the NFL joint enterprise, but on terms dictated by them rather than by joint decision of the participating members. By virtue of the ruling below, the Raiders have forced the entire NFL membership to accept an individual club's unilateral determination as to where League operations will be conducted. But the common enterprise remains in operation because of, and only because of, numerous internal agreements that limit the individual clubs' freedom of action in the same manner as the location agreement.

While respondents concede that league members must be able to agree upon certain matters, such as the scheduling of games (Coliseum Br. 5) and "arranging the games and administering the playing against each other . . ." (Raiders Br. 9), they offer no principled basis for distinguishing such permissible agreements from the NFL location agreement. In traditional parlance, scheduling agreements involve refusals to deal with

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[5] While the rule of reason has an important place in the administration of Section 1, it cannot serve to bring within the section non-collusive actions not within the contemplation of Congress in enacting the Sherman Act. This Court so held in *Copperweld*, rejecting a contention accepted by the minority that *any* action involving two or more legally separate parties should be tested under the rule of reason. 104 S. Ct. at 2746.

certain league members, allocations of territories within which games will be played, and limitations on each "competitor's" output. *See* Pet. at 13-14, n.25. If such arrangements are inherent in league operations and permissible, as respondents concede, they must be so because a league is a common enterprise rather than a collection of independent competitors in implementing such agreements.

In treating the NFL location agreement as a continuing conspiracy subject to Section 1 review, the decision below fails to articulate a coherent antitrust principle that takes into account the inherent "jointness" of league operations. See R. Bork, *The Antitrust Paradox*, 332 (1978). The decision thus does not promote any business competition between "true competitors" (15a) but only precludes the "coordination [that] may be necessary if [this] business enterprise is to compete effectively." *Copperweld, supra*, 104 S Ct. at 2731.

II. PETITIONERS DO NOT SEEK IMMUNITY FROM SECTION 1 OF THE SHERMAN ACT

Petitioners seek only a principled determination of whether "every [league] action [is subject] to judicial scrutiny for reasonableness" (*id.* at 2744), or whether "the logic underlying Congress' decision to exempt unilateral conduct from § 1 scrutiny . . . excludes the conduct" of leagues in jointly deciding where league operations will be conducted. *Id.* at 2745.[6]

The need for such clarification and the potential of the decisions below for magnified antitrust confusion (Pet. 6-14) are emphasized in respondents' own submissions. The Raiders recognize that the "NFL has a legitimate interest in where any

[6] Until the courts below held that league location commitments were subject to Section 1 as conspiracies, the accepted understanding was that such commitments constituted the lawful conduct of a single enterprise. *See* San Francisco Seals v. National Hockey League, 379 F. Supp. 966, 969-70 (C.D. Cal. 1974); and J. Weistart & C. Lowell, *The Law of Sports*, § 5.11, at 698-70 (1979). The Department of Justice itself, through the Antitrust Division, had expressed the view that league decisions on the location of teams may not even present "an antitrust issue" and, in any event, "are not terribly amenable to antitrust resolution . . . . " House Select Committee on Professional Sports, "*Inquiry into Professional Sports*," 94th Cong., 2d Sess. 296, 301 (1976).

member club may play its home games;" they quarrel only with the particular NFL arrangements to which they themselves had subscribed. Br. 12-13. In contrast, the Coliseum asserts that sports leagues could operate "perfectly well" if every team selects its own location for each season, and it suggests that to survive a Section 1 challenge a sports league must prove that it "could not produce games" in the absence of the arrangement challenged. Br. 8.[7]

Respondents assert that if the NFL is recognized as a single enterprise in determining team locations, then Section 1 "could never apply unless NFL concerted with nonmembers." Raiders Br. 17. This simply is not so. Both the dissenting judge below and others have recognized the distinctions between intra-league agreements on scheduling, team location, and other matters confined to the production of NFL football and agreements that restrict the extra-league activities of the clubs collectively or individually. *See* Pet. 12-13, 18-19. One important distinction is whether a league agreement relates to a co-production activity that directly determines the joint conduct of *all* league members or whether it determines the conduct only of an individual club. League members can and do contract with players and coaches individually; they can and do sell their game tickets individually; and club owners may and do have interests outside of NFL football. Agreements as to such matters—whether among league members or with nonmembers—thus constitute concerted action and would be subject to rule of reason review.

But the determination of the locations at which league members present the league product is fundamentally different.

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[7] As noted in the brief Amicus Curiae of the National Basketball Association, this sweeping reading of the decision below has already been advanced by counsel for the respondent Coliseum, in litigation with that basketball league, where an NBA member seeking unilaterally to relocate to the coliseum's basketball arena asserts that under the Ninth Circuit's decision "*any* restriction of *any* kind on the alleged right of a team unilaterally to select the location of its games is a violation of Section 1 . . . . " *Id.* at 4-5, n.3; emphasis original. *See also* the Brief of Public Entities as Amici Curiae in Support of Granting Writ of Certiorari, at 2; and Brief for the Mayor and City Council of Baltimore as Amicus Curiae Supporting Petitioners, at 4-8.

Such determinations are "essentially internal marketing decisions" of the league venture (J. Weistart & C. Lowell, *supra,* at 701)—"not unlike the choice a chain store company makes when it selects a particular corner lot as the location of a new store." *American Football League* v. *National Football League,* 323 F.2d 124, 130 (4th Cir. 1963). Each such determination directly involves the interests of, and controls the conduct of, all league members. *See* Pet. 13-14. All clubs are, for example, required to present NFL games both at "home" and at league-designated "away" locations during each season. Indeed, many NFL clubs derive a large majority of their revenues from operations other than those at their "home" locations.

This Court should not, as the Raiders urge, decline to act pending future legislation by Congress. Raiders Br. 24-27. The issue, as we have shown, is not immunity from Section 1 of the Sherman Act, but a reasoned determination whether that Section's prohibition against collusion among independent competitors applies to joint action by the owners of a common enterprise. Such a determination is analogous to that made last Term in *Copperweld.*

The Sherman Act is notoriously open-ended. This Court early concluded that it would be necessary for predictability in antitrust law to articulate Sherman Act rules and distinctions that in other contexts are often contained in statutes themselves. *See* F. Easterbrook, *Vertical Arrangements and the Rule of Reason,* 53 ABA Antitrust L.J. 135, 137 (1984). Only recently, the Court observed that "Congress did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations." Instead, "it expected the courts to give shape to the statute's broad mandate by drawing on the common law tradition." *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 688 (1978).

In this case, as in *Copperweld,* the Court is asked to apply the broad mandate of Section 1 to an important concrete situation. It is altogether appropriate and consistent with its practice over nine decades of Sherman Act jurisprudence that the Court should do so rather than defer to the vagary of future congressional action.

CONCLUSION

The majority below, notwithstanding its decision in favor of respondents, observed:

> "The NFL is an unique business organization to which it is difficult to apply antitrust rules which were developed in the context of arrangements between actual competitors." (33a.)

Its attempt to surmount this difficulty puts at high risk the ability of all sports leagues to manage their internal affairs without continuing, expensive antitrust harassment. It also offers a treble damage inducement to league members to breach comprehensive agreements governing the joint business operations of lawful enterprises, a result in direct conflict with the objectives of the antitrust laws.

A writ should issue.

Respectfully submitted,

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